No. 11, ORIGINAL.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1905.

IN EQUITY.

THE STATE OF LOUISIANA, *Complainant*,

vs.

THE STATE OF MISSISSIPPI, *Defendant*.

SUPPLEMENTAL BRIEF FOR THE DEFENDANT.

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I.

THE DEEP WATER CHANNEL THEORY.

Counsel for Louisiana earnestly and correctly insist that Lake Borgne is the open sea, and was so regarded by Congress in the Act of 1812, admitting that State. Their words are: "As a matter of fact the waters of Mississippi sound were considered as the sea or as forming part of the sea and gulf of Mexico at that time. We have already shown that Mississippi sound and Lake Borgne are salt water bodies of water *and true parts of the sea or gulf.*" First brief, p. 150. See also p. 69, where that contention is supported by unanswerable authorities. Our opponents miss the mark because they refuse to understand

the meaning of the term "an arm of the sea," as contra-distinguished from the open sea itself. Lake Pontchartrain is an "arm of the sea," because it is within the jaws of the land. That part of the open sea or Gulf of Mexico, known as Lake Borgne is not an "arm of the sea," because it is outside of the jaws of the land. The one and only ground upon which our opponents claim that the doctrine of the thalweg can be applied to the waters in question is that, while it is not applicable to the open sea, it is applicable to an "arm of the sea." When cast in the form of a syllogism their argument is this: Apart from rivers, the doctrine of the thalweg is applicable only to an "arm of the sea"; the waters to which Louisiana wishes to apply it are not an "arm of the sea," but the open sea, "true parts of the sea or gulf"; therefore the Court should apply the doctrine to the open sea. Such a pitiful *non sequitur* is not to be wondered at in view of the fact that no case has ever occurred in the international law of the world wherein the doctrine of the thalweg, *which dies at the point where a river or its estuaries join the open sea*, has ever been extended beyond that point. This fanciful and impossible theory of a channel without banks or current in the open sea as a boundary between maritime states was the invention of W. C. Hodgkins, a civil engineer, who first stated it in his report of January 30, 1901 (see Record, pp. 999–1003), *as a surveyor's expedient* for solving a practical difficulty, regardless of the fact that such expedient is entirely beyond the pale of legality. Manifestly this invention of Hodgkins was put forth here simply as a *ballon d'essai*, as it embodied the only theory upon which

the Complainant could undertake to claim the *entire territory* in dispute. That claim constitutes the first and leading aspect upon which her bill is based. Anticipating its collapse, she stated her case in the alternative as to *a part* of the territory, thus claiming that, in any event, Louisiana must recover those islands which are within nine miles of her eastern coast. The alternative prayer is: "but if your honors should feel that any part of this disputed area was islands by reason of the presence of shallow water, *then as islands they are within the nine mile limit of distance from the* SHORE LINE *of the State of* Louisiana [an admission that she has a shore line], and therefore belong to and form part of the State of Louisiana by that second provision of the act of Congress, giving Louisiana all islands *within three leagues of its* SHORE LINE." Since the collapse of the deep water channel theory only the alternative case as to *a part* of the territory remains for consideration; and that cannot prevail, if this Court applies to the conflicting statutes the *in pari materia* rule as heretofore defined and applied here.

II

The Doctrine of in pari materia.

That doctrine is just as applicable in a case of *conflict and repugnancy* as it is in a case of *doubt and uncertainty*. These two substantive grounds for its application are of equal dignity. When it is applied because of conflict and repugnancy, *it is not of the slightest legal importance*, that one or both of the conflicting statutes should be plain and unambiguous upon its face for the simple and conclusive

reason that it is the repugnancy and not the obscurity that then justifies the application of the rule. Such is the settled law as stated in the Am. and Eng. Enc. of Law, Vol. 26, p. 623, 2d ed. "It has been said that the doctrine that statutes *in pari materia* are to be taken together and construed as one act is resorted to only in cases of doubt and that it is never applicable *where a statute is plain and unambiguous;* but clearly this statement is too sweeping, for a resort to other statutes may be necessary to determine the legislative intent *in case of repugnancy between the statutes*, or may be used to strengthen conclusions on the language of the statute." A striking illustration occurs in the case of *McFarland* v. *State Bank*, 4 Ark., 416, wherein the court was called upon to construe a general statute, fixing a rate of interest which conflicted, in the absence of construction, with a special statute fixing a rate of interest in certain cases, *each statute being entirely unambiguous upon its face.* The court applied the *in pari materia* rule and removed the conflict, by holding that one act should have a general application outside of the special domain to which the other was applied, the course which we contend should be followed here. In *Robinson* v. *Tuttle*, 37 N. H., 248, it was held that "It is also proper to consider the whole of a statute, the provisions of the old law, *other laws relating to the same subject-matter*, and the probable purpose of the legislature, in order to ascertain the meaning of any particular section, *even when the words are unambiguous.*" It is not of the slightest legal importance that the statute of 1812 is plain and unambiguous upon its face, if it is "repugnant" to that of 1817,

when parts of both must of necessity be applied to the same subject-matter. Complainant avers in her bill that the repugnancy exists when she says that the elimination of her deep water channel theory (Record, p. 15), "would cause the limits of the two States to conflict and overlap." That admission is amplified in her brief (p. 65), by the following explanation as to the drafting of the act of 1817: "the oversight consists not 'in framing the respective acts' for the admission of the two States, but in the drafting of the Mississippi act, more than five years after the Louisiana act, *and embracing in the Mississippi act, islands which had already been granted to Louisiana.*" It is thus twice confessed that Congress in the act of 1817, *attempted to convey the islands in question to Mississippi.* The defense is that the will of Congress as thus expressed cannot be executed for the reason that, by the prior act of 1812, the identical islands embraced in the second act were conveyed to Louisiana. The acts thus conflict and interpenetrate when applied *to identically the same subject-matter.* "Statutes are *in pari materia* which relate to the same person or thing or to the same class of persons or things, *and the phrase is applicable to public statutes or general laws made at different times and in reference to the same subject.*" Enc. of Law, Vol. 26, p. 621, 2d ed. How is it possible to deny that the conflicting statutes are *in pari materia*,—"laws made at different times and in reference to the same subject"; how is it possible to deny that they are repugnant to each other, *when Complainant twice avers that fact?* In our humble judgment no more urgent or ideal case for the application of the rule has ever been presented here. The

rule is simply a means to an end. It is the means by which the court is enabled to extract the *entire intention* of Congress, and not a *part of it*, from a series of acts upon the same subject. Not until the last word of the last act in the series has been examined can a court be in a position to make an intelligent exposition of the legislative will in its entirety. When thus armed with the larger knowledge the court should strive to work out two results.

In the first place, as stated in *Knowlton* v. *Moore*, 178 U. S., p. 77, "where a particular construction of a statute will occasion inconvenience *or produce inequality and injustice*, that view is to be avoided if another and more reasonable interpretation is present in the statute." What is the actual situation presented here. Alabama is in possession of all the islands on her southern and only sea-front. Louisiana is possessed of two distinct sea-fronts. First of her southern sea-front, extending east and west about 360 miles from the mouth of the Sabine river to that of the Mississippi; second of her eastern sea-front, extending about 263 miles north and south from the mouth of the river last named to that of the Pearl river. Under those conditions the proposition is to take away from Mississippi a group of islands extending half-way across her narrow *southern* sea-front, in order that they may be annexed to the *eastern coast* of Louisiana. Can it be for a moment denied that such a result would be a gross injustice, so far as Mississippi is concerned, when the fact is remembered *that she would then stand forth as the only State on the Gulf of Mexico with her southern sea-front obstructed by islands belonging to a sister State?* It is admitted that Congress

did what it could in the a[illegible] of 1817, to prevent such an injustice. Should not this Court assert its full judicial power to sustain Congress in that effort? Louisiana admits in her original brief (p. 162), that "It is not to be presumed that the Congress of the United States intended to make a conflict of boundaries when there is a possible construction of the acts of Congress which would reconcile the apparent inconsistencies." Thus it is admitted that the entire solution properly depends upon the right of this Court to *construe* the conflicting statutes. What is its paramount duty in such a case? In *Handly* v. *Anthony*, 5 Wheat., 374, this Court speaking through Marshall, C. J., said: "In great questions which concern the boundaries of states, where great natural boundaries are established *in general terms*, with a view to public convenience, and the avoidance of controversy, we think *the great object*, where it can be distinctly perceived, ought not to be defeated by those technical perplexities which may sometimes influence contracts between individuals." Can any fair mind doubt that "the great object" of Congress in defining the sea-fronts of the States bordering on the Gulf of Mexico was to give to each the islands directly in front of it on the south? *Will it be even suggested that Congress ever intended to obstruct one-half of the narrow southern sea-front of Mississippi, by giving a string of islands there situated 36 miles long to a sister State possessed of a sea-board more than eight times as long?* Upon the contrary Complainant admits that by the act of 1817, Congress did all it could to give the islands in front of the sea-coast of Mississippi to that State. Will this court by its decree scar the map

of the Union for all time by defeating the just will of Congress as thus expressed? If *Handly* v. *Anthony* is to be regarded, "the great object" should not be defeated by "technical perplexities." The Court should not be asked by Complainant to quibble over the contention that the terms of the second act are as general as those of the first. No matter whether they are or not under the rule of *in pari materia*, the Court has a perfect right (as heretofore pointed out in our original brief, pp. 66–70), to hold before its eyes "the great object," and then accomplish it by limiting the general terms of the first act by the particular terms of the second, *if Congress so intended when the two acts are taken as a whole.* The "technical perplexities" in such a case should not be permitted to defeat "the great object."

In the second place, the court cannot ignore the rule which provides that "Statutes are to be interpreted so as to give effect to all the words therein, if such interpretation be reasonable; and be neither repugnant to the provisions, nor inconsistent with the object of the statute. *U. S.* v. *Bassett*, 2 Story R., 389. * * * It is not to be presumed, *that the legislature intended that any part of a statute should be without its proper meaning, force,* or effect." Potter's Dwarris on Statutes, p. 188, note 8. In *Pollard* v. *Kibbe*, 14 Pet., 366, where the issue was identical,—one party striving to defeat a grant made by Congress on the ground that that body had conveyed the same land by a prior grant,—it was held that "*It is not to be presumed that Congress would grant or even simply release the right of the United States to land confessedly before granted. This*

would only be holding out inducements to litigation." The Court must presume that the United States possessed the title at the date of the last grant, and the burden is upon the party who sets up the contrary. If this Court declines to give effect to that part of the act of 1817, which grants to Mississippi "all islands within six leagues of the shore to the most southern junction of Pearl river with Lake Borgne," she will be deprived of Isle à Pitre, Petit Pass Island, Racoon Island, Crooked Island, Mud-cross Island, Pirate Point Island, Nigger Island, Dead Man's Island, Shell Island, Brush Island, Mink Island, Wild Goose Island, Elephant Point Island, Sundown Island, Door Point Island, Martin Island, and Mitchell Islands; in a word, of all islands within eighteen miles of her coast except a very few within a comparatively short distance thereof, such as Cat Island, Ship Island, and Horn Island. Excepting these three or four, a decree in favor of Louisiana will sweep the board and vest in her a chain of islands extending for 36 miles across the face of the narrow sea-front of Mississippi. *So far as we can ascertain the sea-front of no State in the entire Union is obstructed by islands belonging to a sister State.* Why should Mississippi alone wear such a badge of servitude to a neighbor who possesses a sea-front more than eight times as long as her own? Is this court prepared to decree that Congress intended to make such a grossly unjust award in favor of one State as against another, while dividing the common heritage? What the clearly expressed will of Congress was in the act of 1817, even Complainant admits. Against its enforcement she only contends that the *general terms* of the act of 1812 should be *so construed here* as to

include the islands embraced in the second grant. If, in the light of the legislative declaration of intention in the second act, the court ascertains that Congress *did not intend to commit this gross injustice when the first act was passed*, the entire difficulty vanishes,—the grant claimed by Louisiana under the first act was never made.

III.

Those Who Claim Under Grants from Louisiana not in the Category of Bona Fide Purchasers.

The only plea which, as a matter of equity and good conscience, could be set up against the application of the foregoing rules of construction is that those who hold under grants from Louisiana are entitled to the protection due to *bona fide* purchasers. "*Purchasers under quit claim deed.* As a general rule the grantee in a quit claim deed is not accorded the favored position of a *bona fide* purchaser, for the reason that the deed purports to convey only whatever title the grantor may have, *and thus the terms of the deed itself afford constructive notice of any defects or equities by which the title may be impaired.*' * * * '*Grantee in quit claim deed not protected.* The rule and its qualifications will be fully discussed in another part of this title." *Am. and Eng. Enc. of Law*, Vol. 23, p. 477, and note 4. It is well settled that grants made by the legislature of a State are not warranties; and if the thing granted was not in the grantor at the time of the grant, no estate passes to the grantee. *Rice* v. *Minn. & N. W. R. R. Co.*, 1 Black, 358; *Polk* v. *Wendal*, 9 Cranch, 87. With a full knowledge of the infirmities of her title, *and of the approaching*

litigation in this matter, Louisiana was careful that her agent, the Lake Borgne Basin Levee District, should not involve her in liability through sales, at nominal prices, of this land. That board therefore inscribed the following upon the face of its quit claim deeds: "It is distinctly understood by the parties hereto that the Board of Commissioners for the Lake Borgne Basin Levee District, through their said president, transfer, assign, and set over, only those rights and interests which the said Board now have in and to the aforesaid lands, giving thereby simply a quit claim, and making and giving no warranty whatsoever; *and further, that should the said title be subsequently declared void, the said Board shall not reimburse to the purchaser any sum whatever.*" Record, p. 1088. Of course, the illegal attempt to cut out that solemn and significant declaration against the title of Complainant from the body of her quit claim deeds by the parol explanation of one of the counsel in the case will be ignored. If such a result could be accomplished by verbal explanations given under such circumstances written instruments would be worthless indeed. The testimony shows that not a single grantee—all for nominal sums—under these quit claim deeds has ever made an improvement on the land. Not a house, nor a barn, nor a fence has ever been constructed. No settlements have been made on the land for the reason that fishing privileges alone were the objects of the purchase. Thus neither injustice nor hardship would come to any private individual through a recognition of the title of Mississippi.

IV.

No Basis Whatever for the Contention That the Islands in Question Were Ever a Part of the Mainland of Louisiana.

We do not understand Complainant's counsel to contend that the islands in question do not constitute a well defined archipelago distinct from the mainland, *at the present time*. All the rest of the world so considers and describes them. The only accurate maps ever made of the region are those of the Coast Survey, upon every one of which the archipelago is as clearly defined as any other in the world. The people who live in the vicinity have always considered them as such, giving to each its own name as an island. Isle à Pitre and Racoon Island are as well known as islands in that part of the world, as Cat Island or Ship Island. Complainant's witnesses have described them as bodies of firm land standing "about a foot and a half to two feet" (Monier) "above the water," along whose shores a buggy can be driven, or a traveler pass dryshod "at any time during the year." It is not questioned that the waters surrounding them are navigable for steamboats. From the Report of the Fish Commission, upon the cruise of the "Fish Hawk," it appears that "the depth of water is generally from 3 to 6 feet, although in some of the bays, particularly those to the eastward, there are channels through which a considerably greater depth can be carried." Record, p. 2037. It never occurred to the scientific men who made that report to doubt that the islands are such. They say in their description of

the physiography of the region: "The land constitutes *a low-lying archipelago of irregular islands*, separated from one another by shallow bays, muddy lagoons, and tortuous bayous, *the area of water being somewhat greater than that of the land*,"—a statement sharply at variance with the idea that the region is occupied by a peninsula. Admitting as they must that the archipelago now exists entirely distinct from the mainland, counsel for Complainant have taken up the burden that admission puts upon them to prove *that the archipelago did not exist as such in* 1812. A crushing blow was given to that contention when they offered in evidence the map of Saint Bernard (No. 52), made by H. C. Smith. In 1843–'44–'45 the first government survey of this region was made by Powell and Richardson, and the results recorded in the township plats which appear in the record, pp. 1047*a* to 1047*m*, inclusive. An examination of those plats will show conclusively to the Court that at those dates, but little more than 30 years after the admission of Louisiana, the islands composing the archipelago existed just as at the present time, with the contour or shore line of the mainland defined as at the present time. H. C. Smith, the maker of the Saint Bernard map (No. 52), admits in his testimony that he accepted the surveys made by Powell and Richardson as the correct data, despite the fact that more than fifty years had elapsed since it was gathered. To quote his own words: "Q. The township plats, or maps, you refer to, are taken from this map No. 52? A. No, sir. Q. Are they not parts of this map? A. Yes, sir; but this map No. 52 was taken from the township plats. Q. Those plats show, purport to show,

exactly what this map No. 52 shows? A. Yes, sir." Record, p. 736. In connection with this testimony we beg the court to read the testimony of J. B. Baylor, quoted in our original brief (pp. 40–42), from which it appears that the surveys made by the Coast Survey "by trigonometrical methods" demonstrate that no material changes have taken place on that coast in fifty years. Mr. Baylor's summing up was in these words: "As a general proposition, my work showed conclusively to my mind, that there has been no marked change in regard to the washing away of that coast in 50 years. We have accurate work on trigonometrical methods running back to about 1848." It having thus been demonstrated beyond all question by Complainant's own witnesses, speaking from the most reliable scientific data available, that there has been no material change in the geography of the region in question since 1843—a period of 62 years to the present time,—it remains for them to prove if they can, *upon a theoretical basis*, that the marvellous transformation they dream of took place during the 31 years that intervened between 1812 and 1843. The causes to which such a transformation is attributed are threefold—subsidence, storms and musk-rats! The two scientific experts upon whom Complainant relied for the demonstration are Major B. M. Harrod, of the Panama Canal Commission, an eminent civil engineer, and Dr. Stubbs, eminent as a geologist specially familiar with the Gulf Coast region. Both concur in the conclusion that the islands were formed as such in the waters of a shallow sea. As Major Harrod expressed it they were "formed by the river deposits being placed out in a shallow

sea, that had tidal movements and *instead of forming a solid peninsula* it left these open areas through it for the tidal movement in and out of Lake Borgne and Lake Pontchartrain, and that those lakes or spaces of water have been enlarged since their formation, by subsidence. That is my opinion about the formation of that peninsula; that water areas were left *when it was originally formed* and have since been enlarged by subsidence. Q. How long do you think this process has been going on; how many years? A. *For centuries* I have no doubt." When the effort was made to pin him down to modern times he said: "*I could not give any answer about the time, since* 1817 *or* 1819." Record, p. 135. The essence of Major Harrod's scientific opinion when stripped of awkward verbiage, is that as the river deposits were placed in a shallow sea with tidal movements, such movements prevented the formation of a "solid peninsula," and insured instead the formation *from the beginning* of the islands with water areas between them. It is not pretended that Major Harrod said one thing while he was trying to say another. That compliment was reserved for Dr. Stubbs who gave the *coup de grace* to that part of Complainant's case when he said: "These [islands] on the coast of Louisiana have not been *cut off*, they have been formed by the waves and winds of the Gulf." Record, pp. 344–345. Just a moment before, his cross-examination had begun with this question: "You are familiar, are you not, with the geography of this archipelago of islands lying off the east coast of Saint Bernard parish and the southeast coast of Mississippi? A. Yes, sir." On page 3 of their last brief counsel for

Louisiana have made this ill-tempered and entirely unfounded statement: "Associate counsel for the State of Mississippi, in their brief, have extracted from the testimony of Dr. William C. Stubbs, State Geologist of the State of Louisiana, on the subject of the geological origin of the peninsula of Saint Bernard and the Louisiana marshes, and have attempted by *garbling* that testimony, to now make it appear that Dr. Stubbs said that the territory composing the disputed area in the parish of Saint Bernard was made up of islands, which had been built up by the winds and waves of the sea, instead of by alluvium deposited by the Mississippi river, through Bayous Terre aux Bœufs and La Loutre, and that the insular formation of certain portions of the Louisiana marshes (or islands, so-called by Mississippi), has never formed part of the peninsula of Saint Bernard, but were distinct creations formed by the winds and waves of the sea, and not by alluvium." The very contrary is the fact, as counsel for Mississippi claim, and have always claimed that Dr. Stubbs intended to say that the islands in question were formed "by the waves and winds of the Gulf," *out of the* alluvium deposited by the Mississippi river, thus agreeing in substance with Major Harrod who says they were "formed by the river deposits being placed out in a shallow sea, that had tidal movements." There is no difference between us as to the *material* out of which the islands were formed; the difference is as to the *process* of formation, Complainant claiming that the alluvium was first consolidated as a part of the mainland, and then broken up or "cut off" by subsidence and storm-action, Defendant claiming that the alluvium as it was

deposited in the shallow sea was formed by the winds and waves into islands *from the beginning*, according to the view of Major Harrod. The mortal blow given by Dr. Stubbs to this part of Complainant's case was by his declaration that the islands were formed *according to the theory of Defendant*, and that they were not "cut off" from the mainland as claimed by Complainant. Under such trying circumstances our opponents are striving to save themselves by showing that Dr. Stubbs was not responding to the question with which his cross-examination had just opened ["Q. You are familiar, are you not, with the geography of this archipelago of islands lying off the east coast of Saint Bernard Parish and the south coast of Mississippi? A. Yes, sir"], but that he was really speaking of some other islands not involved in the case, on the south coast of Louisiana, as to which he had been fully questioned some time before. It is strange, indeed, if such a mistake was made as to this, the most vital question of fact in the case, by Complainant's most important witness, with her learned and acute counsel present, that no attempt was made to correct it at the time when the witness was accessible. The charge that Defendant's counsel are "*garbling* that testimony," because they read it as it appears in the record, must be pardoned as an outcry of pain suffered by our friends on the other side, when their main prop, Dr. Stubbs, extinguished their pet theory by inflicting upon it "the unkindest cut of all." But it is unnecessary for us to depend upon the testimony or admission of any one witness in a mass of evidence which demonstrates beyond any possibility of doubt that the

archipelago in question existed in 1812, just as it exists to-day. Dr. Stubbs positively declined to admit that any of the changes to which he had alluded had taken place in historic times. Speaking of the sample of mud taken from Isle à Pitre he said: "We won't state any length of time. But the geological time in which that was deposited is to-day, it is the present age. Q. But that present age, as I understand, may embrace a period of five million years? A. We don't know. Q. It may be five million years? A. Yes, sir. Q. That was in the process of formation? A. Yes, sir. * * * Q. You know of no reason to suppose there has been any general change of appearance in the physical aspect of the region I have indicated from 1812 down to this date? A. *That is right.*" Record, pp. 346, 349. The assumption that a radical transformation took place in the geography of this region between 1812 and 1843, *through the slow and imperceptible processes of nature* is a pure chimera, as untenable from a geological point of view as the so-called deep water channel theory is from the standpoint of international law.

V.

An Imaginary Coast Line.

On a par with the foregoing is the assumption that in 1812, the chain of islands that extends from Nine Mile Bayou to Isle à Pitre constituted a part of the mainland of Louisiana, with a well defined coast line. The witness upon whom Complainant mainly relied to uphold that theory is J. B. Baylor, the Coast Survey expert who, upon cross-examination, admitted the present existence of every

island in the chain. His examination on that subject thus began: "Q. What is the usual definition given by geographers to an island? What is an island from the standpoint of physical geography? A. An island is a body of land surrounded by water. Q. Well, now, let us begin from Nine Mile Bayou and take the piece of land that is bounded on the west by Nine Mile Bayou and on the east by Three Mile Bayou and on the north by Mississippi Sound and on the south by Nine Mile Bay. Under the ordinary definition of physical geography, isn't that an island, a piece of land surrounded by water? A. Yes, sir; that is an island." And so he described one after the other in the entire chain, concluding as to all, with this statement: "*They are certainly bodies of land around which vessels of moderate draft can sail.*" Record, pp. 421, 422. In his testimony heretofore quoted he says that, after an examination of the whole coast "by trigonometrical methods," and upon the data of the Coast Survey, extending back to 1848, he can aver "that there has been no marked change in regard to the washing away of that coast in 50 years." It is, therefore, positively settled that the islands existed as far back as 1848, just as they exist to-day. The burden then is upon Complainant to prove the marvellous transformation claimed during the 36 years intervening between 1812 and 1848. There is not a particle of evidence in the record even tending to prove such a grotesque assumption. Complainant has nothing whatever to rely upon in this regard, except the theory that silent and imperceptible changes have been going on in this region during, as Dr. Stubbs says, the last

five million years. *There is absolutely no proof in the record that any material changes have taken place in historic times, much less since* 1812. If Harrod and Stubbs are to be believed the islands in question existed as such from the beginning, and were never a part of the mainland. These particular islands are directly in the track of "the tidal movement in and out of Lake Borgne and Lake Pontchartrain," which Harrod says prevented the formation of a peninsula. An unbroken coast line at the point claimed would have obstructed that tidal movement.

VI.

Claim of Title Under the Swamp Land Act of 1849.

No part of Complainant's case is so easily disposed of as the claim resting on certain proceedings taken before the Secretary of the Interior in 1852, under the act of 1849, entitled, "An act to aid the State of Louisiana in draining the swamp lands *therein*." The act declares upon its face that it relates only to certain lands within the boundaries of that State. As one of the Justices remarked during the argument, swamp lands situated in one State could not possibly be given to another. If Mississippi has any case here at all, it is by virtue of the grant made to her of certain islands by the act of 1817. If that act ever had any operation at all, if it ever vested in Mississippi the whole or any part of the territory in dispute, such whole or part was at once included within her boundaries. It is therefore axiomatic that proceedings taken before a ministerial officer in 1852, under an act which did not attempt to dispose of lands beyond the

boundaries of Louisiana, could not divest Mississippi of title to lands which had been included in her boundaries since 1817. As to such lands the action of the Secretary was of course *coram non judice*. In *Stone* v. *United States*, 2 Wall., 525, involving the validity of acts of the Secretary of the Interior under like circumstances, it was held that where lands claimed *were never within the limits of a reservation* legally made by the President for military purposes, the patents issued therefor were void because the Secretary exceeded his authority. If an appeal be made to the doctrine that decisions of the Secretary of the Interior upon matters of fact are conclusive, the short answer is that that doctrine only applies to matters of fact *within his jurisdiction*. "The decisions of the Land Department upon matters of fact *within its jurisdiction* are in the absence of fraud or imposition, conclusive and binding on the courts of the country." Head note to *Heath* v. *Wallace*, 138 U. S., 573, Co-op. ed., 1064. It will not be pretended that the Secretary had jurisdiction over lands within the boundaries of Mississippi since 1817, under an act passed in 1849, granting certain lands within the boundaries of Louisiana, at that date, to that State. The moment that Mississippi makes good her claim of title to the whole or a part of the disputed territory, under the grant made to her in the act of 1817, all proceedings as to the whole or part embraced within her boundaries, taken by the Secretary of the Interior under an act that limited his jurisdiction to lands within the boundaries of Louisiana, fall to the ground. With a clear knowledge of that fact before it, and with this litigation approaching,

the Lake Borgne Basin Levee District did well to write upon the face of its quit claim deeds, "and further, that should the said title be subsequently declared void, the said Board shall not reimburse to the purchaser any sum whatever."

VII.

The Question of Acquiescence.

It is folly to contend that upon the facts in this record there is any proof even tending to show any acquiescence upon the part of Mississippi in the possession of the disputed territory by Louisiana, or in her exercise of dominion and sovereignty over it, that will give title to the latter, by acquiescence, under the principles of international law. Mississippi emphatically denies that she has ever for one moment acquiesced in any claim asserted by Louisiana either of sovereignty or jurisdiction; that the proof shows that her exercise of sovereignty and jurisdiction over the disputed area—*a "wild and unsettled country"*—has been much more marked and continuous than that of her opponent. There is no excuse for the statement contained in the original brief for Complainant, p. 98, that Mississippi has acquiesced "for nearly one hundred years in Louisiana's ownership of the disputed territory." The record bears abundant testimony to the fact that, from time immemorial up to about the year 1900, the people of either State enjoyed the unmolested privilege of taking fish and oysters in the disputed territory, its only product. The State of Louisiana cannot claim to have exercised exclusive dominion because of the full proof of the long common use. The enabling act passed

by the Congress on the 20th of February, 1811, required as a condition precedent to her admission.

> "That said convention shall provide by ordinance, irrevocable without the consent of the United States, that the people inhabiting the said territory, do agree and declare, that they forever disclaim all right or title to the waste and unappropriated lands lying within the said territory, and that the same shall be and remain at the sole and entire disposition of the United States."

This condition was accepted by Louisiana. Before 1852, a trespass upon these lands or any question involving the title thereto would have been cognizable in the United States courts only. During the forty years that the State claimed these waste lands, to April 2d, 1895, when she attempted to transfer them to the Lake Borgne Basin Levee Board, she made only 30 sales, or upon an average of less than one a year, the principal ones being of Isle à Pitre. From said transfer in 1895 to the bringing of this suit, only *four* sales are shown by said Board, and these to oyster canners at 12½ cents per acre, wholly without warranty of title or promise of the return of the purchase money if the title failed. So, there is nothing shown which would have put Mississippi on notice of necessity to assert her rights or confess them to Louisiana. The sales have been of the *waters*, rather than of *land*, to secure oyster grounds.

The acquiescence contended for by Complainant is not to be established by those rules which determine *public policy*, as the argument of counsel seems to indicate. Statutes, court decisions, and the lawful acts of public

officers fix the public policy of the State or federal government with reference to any particular subject, but the only way to deprive a State of her territory is prescribed by the Constitution—the consent of the legislatures of the States and of the Congress. If the General Land Office, the Geological Department, the Coast and Geodetic Survey, and the Fish Commission of the Federal Government, combined with the Oyster Commission of the litigant States, had solemnly agreed by express words that the disputed territory was in the one State or the other, it would be folly to urge here that by reason thereof the question was thus settled. The acquiescence contemplated must come within the rules indicated in *Rhode Island* v. *Massachusetts; Virginia* v. *Tennessee*. We insist generally, and especially upon the subject of acquiescence, that the approval of these lands by the Secretary of the Interior in 1852, was a mere ministerial act and void because these marsh lands could not be drained or levied and were not within the contemplation of the act of 1849, special to Louisiana, nor the "Arkansas Act," of 1852; and because the lands in dispute had previously (1817), been expressly granted to the State of Mississippi. It is shown that the proceeds of sale were to be applied to the levees of the Mississippi river and not to the levying or draining of these islands on the eastern coast of Louisiana.

When a request was made by the Coast and Geodetic Survey for "records" bearing upon the State boundary, the answer was a legal opinion from Assistant Hodgkin, not a lawyer, but a civil engineer. However much counsel insist, this court will not be misled as to this or as to the

report from the "Fish Hawk" deputation that followed the suggestion of Louisiana gentlemen as to what was the parish of St. Bernard.

The statement in the brief, p. 122, that Mississippi "*though her State Land Commissioner admitted that she had no title to the lands,*" is incorrect. The record discloses no such statement, and if it did, it would be demurrable. Mr. Nall said that these lands were not shown upon his books. It cannot possibly escape the attention of the Court that the only material value of the territory is, as it has always been, in water products and that Mississippi has since 1843, protected her interests by legislation, and latterly she has collected her revenues therefrom by licenses from boats and tong-men, instead of assessments upon the worthless lands.

Judicial jurisdiction on the part of Mississippi is shown by authentic records from 1821, when the Legislature made the award to John Quavre, and the Kennedy inquest of 1886, and the arrest made by officer Lizanna near Sundown Island, while that shown by Louisiana is of the vaguest hearsay. The absolute assertion of right by legislative action on the part of Mississippi is shown in the cross-bill, and by documents exhibited with the testimony.

VIII.

The State of Louisiana Embraces But One Island East of the River.

We here expressly direct the Court's attention to the fact that counsel for Louisiana in their oral argument and in their supplemental brief, have cautiously declined to

meet the proposition that the present State of Louisiana includes nothing east of the Mississippi river except "the city of New Orleans and the island on which it stands." Congress had this information fresh in mind. See abridgment of Debates of Congress, vol. III, p. 9 *et seq.;* if vol. IV, pp. 253-264. The acts of 1812 fixing Louisiana's boundaries and that adding West Florida to the Mississippi Territory were framed while the discussion between the United States on the one side and France and Spain on the other was at its height. The Congress knew the boundaries of the real *Louisiana* of 1803. The authors of the acts of 1812 knew that the conceded boundary line of Louisiana east of the Mississippi was that which was adopted in the 1811 enabling act and in the act of April 6, 1812. They knew this line had always been expressly explained as cutting off one island, the Island of New Orleans. They knew all the remaining islands were left on the east bank and that all such remaining islands were available for territory-making. They added them to the Mississippi territory at the same sitting of Congress. This information which the authors of the laws possessed told them that the three-league limit provision in the Louisiana act could not operate to the eastward,—that under other provisions *in the same act* it could not begin to operate until the Island of New Orleans was passed; that the islands upon which the three-league limit provision was to operate were those off the 400 miles of southern mainland coast line of the new State, and not those along the coast of the Island of New Orleans.

Counsel for Louisiana have, in fact, admitted the correctness of our statement of facts just made herein. We ask the Court to note the following:

On page 53 of their original brief counsel for Louisiana say:

> "The adoption by the Congress of the United States, in the creation of the State of Louisiana, of the line extending down the Mississippi river to the river Iberville and thence through the middle of Lakes Maurepas and Pontchartrain to the sea, as one of the boundaries of that State, was not a new line established for the first time, but was in fact an affirmation and recognition of an ancient line long since established."

It is true they add that this ancient line "in its extension to the open sea must follow the deep-water channel that we have been discussing." But in making this additional statement they overlook the fact which they have conceded on page 150 of their brief that, for the purposes of this historical description used by Congress, Lake Borgne was the "sea" or the "Gulf of Mexico"; and they also ignore the explanation of this historical description made when the said line was first established in 1763. That explanation is found in section VII of the Treaty of Paris of 1763. R., p. 1864. See also instructions given by the French King to M. d'Abbadie. R., p. 1980.

It will be noted that the territory here directed to be turned over to Spain was that which was declared by the Treaty of 1763, to be separated from the English possessions east of the river by the line described as running along the Iberville river, from the Lakes Maurepas and Pontchartrain to the sea. This line cut off this one island east of the Mississippi.

Counsel for Louisiana say that the ancient description was not itself complete and that it needed to be defined from the mouth of the Pontchartrain to the open sea, and that the only way for it to go was and is by the deep-water sailing channel. But, as above shown, this contention ignores the explanation of the description. It cut off the one island, the one on which the city stands. Why not look for the limits of this one island reserved to save the city? Is there no way to bound an island except by following a deep-water channel? Is not Nine Mile Bayou more than a quarter of a mile wide and from 5 to 35 feet deep, large enough to form the boundary of an island which has been reserved to carry a city?

And again, on page 57 of said original brief, counsel for Louisiana say:

> "Congress regarded the lands to the east, that were south of the Mississippi territory and which form the disputed area of to-day, as part of the original island of New Orleans referred to in the original treaties and included in its treaty with France of April 30, 1803, and these were given to the Territory of Orleans, and *her southeastern boundary was the original southeastern boundary of the island of Orleans.*"

And the Court will recall that Attorney-General Guion, in his oral argument, stated in answer to a question from the bench, that the present State of Louisiana embraces only what was contained in the old territory of Orleans.

Then counsel for the two States are agreed upon the following propositions:

1. The description of the line from the Mississippi eastward used in the act of April 6, 1812, must be given its historical meaning.

2. The present State of Louisiana embraces only what was contained in the Territory of Orleans.

3. The Territory of Orleans embraced nothing on the east side of the river except the island of New Orleans, the southeastern boundary of the said Territory of Orleans being the original southeastern boundary of the Island of New Orleans.

Since we are agreed that the historical description was used and that it cut off only one island east of the river and that the southeastern boundary of this *one island* was the boundary of the Orleans Territory and necessarily of the present State of Louisiana, why not make up the issue here and determine the boundaries of this one island? Why go on a hunt for a deep-water channel? What has that to do with the boundaries of this one island? How can counsel for Louisiana contend for the islands within three leagues of the eastern shore of this one island while they are admitting that they get but this one island under their historical description?

In their supplemental brief counsel do say that it has been attempted to show "that the Louisiana purchase did not convey any land or territory east of the Mississippi other than the Island of Orleans." But we have made no such contention. This statement is only an evasion. We have never contended that the Louisiana purchase included nothing east of the river except the Island of New Orleans, but that the real conceded bounda-

ries of the Louisiana purchase in 1803, embraced nothing but this one island. There was other doubtful territory which this Court held, in deference to the construction placed upon the 1803 treaty by other departments of the government, to have been ceded to the United States by that same treaty. And counsel agree with us when they say on page 57 of their original brief that the "Congress intended to include in the Territory of Orleans not only what had constituted the Island of Orleans on the left or east bank of the Mississippi river, and referred to in the original treaties, but also further additional lands *west* of said river"; and again on the same page they say the southeastern boundary of the Territory of Orleans "was the original southeastern boundary of the Island of Orleans."

After thus stating our proposition on page 38 of the supplemental brief, counsel say "there are four distinct reasons why this theory of the Louisiana purchase not including any territory east of the Island of New Orleans cannot prevail." We will examine the four reasons offered by counsel for Louisiana to see whether they show unsoundness in our proposition that *the territory of New Orleans and the present State of Louisiana included and now embraces nothing except part of the territory admitted by France to have been ceded to the United States under the name of Louisiana, that is, nothing east of the river except the Island of New Orleans.*

They say:

> "1st. If it be true, that the Mississippi line extends to the Lake of the Mounds,

> as the six-league limit, that part of Saint Bernard parish lying south of that point, would belong to no State at all." Page 38 of supplemental brief.

It is difficult to see the alleged conclusiveness of this reason. If the statutes were not written so as to embrace all the territory owned by the United States such other territory still belongs to the Federal Government. The Chandeleur Islands furnish an instance. They do not belong to Mississippi nor to Louisiana. Certain map-makers of recent years have attempted by the use of coloring material to give them to Louisiana. But they are not claimed to have ever been part of the mainland of Louisiana or of the Island of New Orleans, nor are they within three leagues of the most eastern coast line claimed by Louisiana. They belong to the United States, as, strictly speaking, do all islands off the coast of the Island of New Orleans not within six leagues of the Mississippi coast. There may be a deep-water channel running north of them, but this does not give them to Louisiana. Congress mentioned no deep-water channel, and it was never heard of, prior to the report made by W. C. Hodgkins. Louisiana is endeavoring to have a line declared which will not only take from Mississippi the islands given her by the Congress, but will also take in the other outlying islands which were embraced within the limits of neither State, but which are still the territory of the United States.

The next reason given on the same page is:

> "2d. If it be true, then Louisiana would have no boundary on the Gulf of Mexico to the northeast as the act of Congress provides,

> but its boundary here would be a land boundary adjoining Mississippi's line at the Lake of the Mounds."

But does this water area in dispute lose its character as part of the Gulf of Mexico because of the presence of the islands? If Lake Borgne is part of the Gulf is not Bay Boudreau a part of it too? The line we ask this Court to declare and establish as the eastern boundary of the Island of New Orleans runs through Nine Mile Bayou a short distance till it reaches the broad waters of Bay Boudreau or False Mouth Bay, and from there to the six-league limit there is a broad, prominent, natural boundary. It is all the Gulf. The tide ebbs and flows through it. Louisiana would still have her water boundary, her Gulf boundary, all the way. There may be islands which the line would cross in running eastward, but this would be for a short distance only. Besides, it is left to this Court to dispose of islands which may be crossed by the line.

Another reason offered is:

> "3d. It would utterly negative Mr. Jefferson's memoranda, on which Congress is presumed to have acted, that Saint Bernard extended 18 leagues, or 54 miles to the eastward from the Mississippi river."

Mr. Jefferson's memoranda referred to is that quoted on page 41 of the original brief for Louisiana in which the settlement of the Poblacion de St. Bernardo is described. Counsel are fully aware that the old St. Bernard settlement of 1804, *did not extend as far eastward as Nine Mile Bayou*, and that the peninsula between Nine Mile Bayou and Lake

Borgne was a part of the parish of Plaquemine before it was made a part of St. Bernard. It also appears that Mr. Jefferson measured the sinuous line of Bayou Terre aux Bœuf, or he was plainly mistaken in the distance, for it will be noted that he says it travels eastward 18 leagues and then, afterwards, falls into Lake Borgne and the sea. Now it is not 18 leagues from the Mississippi to the point where this Bayou divides, nor is it 18 leagues to the point where it falls into Lake Borgne. It is not 18 leagues to the point where one division of it falls into the sea. *We know the very points referred to by Mr. Jefferson, and know he was mistaken in his estimates of the distances.* He said it was 18 leagues from the Mississippi to the point where Bayou Terre aux Bœuf divides itself into two branches. *We know the precise point* where it divides and know it to be not 18 leagues nor one-half that distance. See other quotations from this same document of Mr. Jefferson on page 15 of the brief by the Attorney-General and Assistant Attorney-General of Mississippi.

And the Court is here again referred to the historical diagrams appearing on pages 1032 and 1033, of the record, the same having been offered in evidence by Louisiana, and that on page 1032, having been reproduced on page 36 of original brief for Louisiana. And especially is the attention of the Court asked to Ellicott's map, since his is the one most likely used by the authors of the laws. The feature common to Ellicott's map and these historical diagrams is that they show the eastern boundary of the Island of New Orleans precisely where we find it to-day, in perfect consonance with the Congressional idea as

manifested by the legislation involved herein, and in perfect accord with tradition.

The final reason offered is:

> "4th. That his theory would negative the American claim that the Louisiana purchase extended along the coast as far as Mobile and the Perdido river, which claim is supported in 2d Peters, 253, in an able opinion by Marshall, C. J., which repudiates the present theory of the Attorney-General of Mississippi."

This also is an answer to an argument which we have never dreamed of making. In that same opinion Chief Justice Marshall recognized the historical meaning attached to the description of the line from the Mississippi eastward through Iberville river and Lakes Maurepas and Pontchartrain to the sea. R., p. 1880. This line was the boundary, on the east side of the river, of the province of Louisiana, which France admitted to have sold to the United States in 1803. It marked the boundary of the province whose title in the United States was perfect. We claimed West Florida, but our title was not quieted until 1819. This line cut off only the one island east of the river. Our title was perfect to this island only. No territory was organized into the State of Louisiana by the original act of April 6, except that to which we had a perfect title. In their original brief, on page 57, counsel concur in this statement when they say that the Territory of Orleans embraced the one island east of the river, and that the southeastern boundary of the Territory of Orleans was the southeastern boundary of the Island of New Orleans.

The limits of the Island of New Orleans.

1. We have referred the Court to Mr. Jefferson's statement that it was a narrow strip along the east bank of the river.

2. We have called attention to Ellicott's map, which shows the eastern boundary of this island as being on a north and south line with the eastern branch of Pearl river. And Ellicott's map, we have shown, is the one to which reference was made for information respecting this territory.

3. We have shown by overwhelming proof that tradition tells but one story about the location of the line and that story is that it runs south out of the eastern branch of the Pearl 18 miles.

4. This tradition has been preserved along the Mississippi coast only. There is no Louisiana tradition respecting it.

5. This tradition has been shown mainly by fishermen and boatmen, they being the only people who have ever had occasion to inquire or to learn.

6. The diagrams picturing the historical idea of this island have been offered by Louisiana and indorsed by her counsel. These diagrams are in perfect harmony with tradition, with Mr. Jefferson's statement, with Ellicott's presentation, *and with the facts as they now exist.*

7. History demonstrates the fact that this island was thought to begin about the mouth of Pontchartrain, that being understood to coincide with the mouth of the Pearl. West Florida embraced all the islands within six leagues of the shore westward *to the mouth of Pontchartrain.* This

gave that province every island east of the Mississippi and within six leagues of the shore, excepting the island of New Orleans. West Florida embraced islands close up to the Island of New Orleans. If they were in West Florida they are now in Mississippi.

8. The Island of New Orleans was added to the west bank of the river only because the city stood on it. The city was the principal object aimed at. The island was carried with it only because it was the location of the city. It will be observed that the explanation of the description in the Treaty of 1763, is "the town of New Orleans and the island whereon it stands." The town is mentioned as the principal item of the stipulation; the island is carried because it holds the city.

9. We find to-day that this island extends only to Nine Mile Bayou, and this eastern boundary is almost directly on the line extended from the mouth of Pearl river south. We find here a large natural boundary coinciding with the historical line, with Ellicott's line shown on his map, and with the line of tradition.

10. We find too that this great natural boundary existed in 1843, as it is seen to-day. We compare a map of 1903 with one of 1843, and find no change in the face of the country. We have this positive proof of the rapidity with which changes are in progress in that section. We find that it has been severely tried during this 60 years by storms, but no perceptible change has occurred.

11. Since our large natural boundary Nine Mile Bayou existed in 1843 as it does to-day, as an extension of the Pearl river line south, we may with perfect safety

assume that it so existed in 1812, in 1803, in 1763. If no perceptible change has occurred in 60 years, who can say how long the alleged process at work in this section would require to show results?

12. And, more powerful still, the line for which we contend as the eastern boundary of the Island of New Orleans, the Pearl river line extended, is the one intended by the Congress. The framers of the Act of 1817 treated West Florida and the Mississippi Territory as including everything immediately south of the coast line extending eastward from the most eastern branch of the Pearl. They knew that Louisiana extended across the Mississippi only to take in one island, and that all the rest of the islands were still available. The description found in the Act of 1817 would never have been used if the Island of New Orleans had been regarded as extending around in front of the Mississippi Territory, or if it had been considered that Louisiana embraced the islands eastward and within three leagues of the mainland of her island on the east bank of the Mississippi. To say the authors of the 1817 law regarded the Louisiana act as having the meaning which Complainant is now attempting to give it is to charge them with ignorance and criminal carelessness.

13. The adoption of this line, the extension of the Pearl river line south through Nine Mile Bayou, as the eastern boundary of the Island of New Orleans, removes the conflict by precluding the operation, in the same territory, of the six-league limit provision of the Mississippi act, and of the three-league limit provision of the Louisiana law.

14. The adoption of this side line will give full effect to the six-league limit provision in the Mississippi act, which calls for measurements from a well-defined shore line, thus permitting that which is certain to prevail.

15. Convenience and expediency ask for the same line. See the memorial of the people of West Florida to be added to the Mississippi territory, on page 2003 of the record. This disputed area is foreign to Louisiana. It is from 15 to 35 miles from the settled portion of St. Bernard parish, and perhaps 45 miles from the courthouse of that parish—and it has never been embraced within the limits of that parish by any act of the Legislature. It is in front of and within a few miles of the most thickly settled and prosperous part of Mississippi.

16. Nothing shown by this record can reasonably be urged against the adoption of the Pearl river line extended through Nine Mile Bayou, as the eastern boundary of the Island of New Orleans, except the various maps which have pictured this disputed area as a solid peninsula. Will map-makers be permitted, for the purposes of this litigation, to obliterate the broad bodies of water which these islands surround, and weld the entire territory together and form a solid peninsula? The change has not been in the physical conditions, but in the information concerning these conditions.

17. This Court is now called upon to define for the first time the eastern boundary of the Island of New Orleans The necessity has just arisen. The disputed area is *wild land*. There can be no actual *occupancy of it*. It has been open to the world except during the last four years. The

conflict has occurred within that time. As soon as it was known that Louisiana claimed it a protest arose from Mississippi and a dispute between the citizens of the two States. At the meeting of the citizens of the two States in New Orleans in 1901, at the instance of the two governors, when the Representatives of Louisiana suggested their deep-water channel line, the spontaneous expression of the Representatives of Mississippi was "this is a novel contention." R., p. 25. They had never heard of it before.

18. And we submit that since it is *wild land;* since the occasion has just arisen to mark the boundary; since there has been no pretence of a line marked on the earth, up to which the two States have claimed; since no property rights of any consequence have existed; since the Pearl river line extended will restore perfect order and attribute to the Congress full information as to the history of the section; and since Louisiana has made no sufficient proof of change in the face of the said area, *therefore this Court will pass upon the issues involved and construe the two laws with reference to the physical conditions and the truth of history just as if the original bill herein had been filed in* 1818 *instead of in* 1902, *and apply them without reference to anything which has occurred since* 1817.

IX.

Summary.

During the argument one of the Justices propounded this question: Suppose (1) that Louisiana fails to maintain her contention as to the deep-water channel theory; and

(2) that Mississippi fails to maintain her contention as to the application of the doctrine of *in pari materia*, how will the case then stand before the Court. Assuming that the archipelago existed in 1812, as it does to-day, the deep-water channel theory is the only basis of the first aspect of Complainant's bill, the only basis upon which she can claim *the entire territory* in dispute. As stated heretofore, in anticipation of the collapse of the deep-water channel theory, she drafted her bill in the alternative, the alternative prayer reading as follows: "But if your honors should feel that any part of this disputed area was *islands* by reason of the presence of shallow water, then *as islands* they are within the nine-mile limit of distance *from the shore line of the State of Louisiana*, and therefore belong to and form part of the State of Louisiana by that second provision of the act of Congress giving Louisiana *all islands within three leagues of its shore line.*" With the collapse of the deep-water channel theory, and with the failure of Complainant to prove, *the burden being upon her*, that the archipelago did not exist in 1812 as it does to-day, nothing remains except the second aspect of her bill in which she prays that if the Court finds that the islands do exist she shall be given such of them as "are within the nine-mile limit of distance from the shore line of Louisiana." If we are correct in assuming that only the second aspect of the bill now remains for consideration, this Court could not go beyond its prayer, *even if Mississippi withdrew all defense in order that a decree pro confeesso might be entered against her.* The second aspect of the bill is based upon an admission that all the islands outside of the nine-

mile limit belong to Mississippi. On the other hand, Mississippi claims the entire territory in dispute upon two clearly defined bases: First, by virtue of the doctrine of *in pari materia* which, if applied as we contend it should be, removes all obstacles to the execution of the grant contained in the act of 1817 whereby Congress conveyed to Defendant "all islands within *six leagues of the shore* to the most southern junction of Pearl river with Lake Borgne"; second, by virtue of the contention that, regardless of the doctrine of *in pari materia*, no obstacle stands in the way of the execution of that grant, because it does not take away from Louisiana any territory vested in her by the act of 1812,—that act never having attempted to convey to her anything east of the Mississippi except the Island of New Orleans. The essence of the second contention is that Congress never intended to convey to Louisiana any islands east of the Island of New Orleans, all such islands being embraced within the boundaries of West Florida. As both contentions have been fully presented heretofore, they need not be restated here. Mississippi contends with respectful and confident earnestness that no application of the law can be made to the facts of this case, either upon a practical or scientific basis, which will take from her any of the islands situated within the eighteen-mile limit from her shore, so clearly and distinctly defined in the act of 1817. It should never be for a moment forgotten (1) that Louisiana frankly admits that Congress attempted to convey to Mississippi the islands in question by that act; (2) that the intention of Congress thus admitted should not be defeated by a construction holding that that

body intended in the act of 1812 to vest in Louisiana a long chain of islands extending half way across the sea-front of Mississippi, when the Court knows judicially that such an injustice has never been inflicted by Congress upon any other State in the entire Union. But if the Court in its wisdom shall reject that contention, then we assume it to be certain that it will not decree to Louisiana more of the islands in dispute than are prayed for in the second and only remaining aspect of her bill. To repeat the language of that prayer, the islands "*within the nine-mile limit of distance from the shore line of the State of Louisiana.*" The last phrase removes all excuse for the idea that Louisiana has not a "shore line" like any other State. Congress said she had when it gave her "all islands within three leagues of the *coast.*" "In a statute which requires measurement from *the coast* the coast is the point of contact of the *mainland* with the sea; and when a bay intervenes the point of contact of the bay with the *mainland* is to be considered coast." Farnham on Waters and Water Rights, Vol. II, p. 1463, citing *Hamilton* v. *Manieff*, 11 Texas, 718. Unless Louisiana has *a mainland coast* how could islands lie within three leagues of it? The point of contact of the sea with the edges of outlying islands is not the "coast" as known either to municipal or international law, except when the marine league is to be measured; it is never so considered when domestic boundaries are involved. The red line on the map No. 59, herewith submitted for the convenience of the Court, defines the coast or shore line from which Louisiana prays that the nine-mile limit shall be measured. It states the

matter in as favorable a light as it can be put for her. The undisputed proof is that the waters are navigable from Nine Mile Bayou at one end of that shore line to the Lake of the Mound at the other. Charles Sanger says: "We went in through Nine Mile Bayou, then we went through— Q. Bay Bordeaux, then into Treasure Bay, then where did you go? A. I think somewhere up in here, that is where we stopped. (Witness here pointed out on the map before him the Lake of the Mound.) By Mr. Zacharie: Q. Do you mean to say you went into the Lake of the Mound? A. Somewhere up in here. Q. Somewhere near Lake of the Mound? A. Yes, sir. Q. Did you go out there with your boat? A. Yes, sir. Q. Did you come out the same route? A. Yes, sir." Record, pp. 264–265. This uncontested proof as to the navigable character of the water along the shore line from Nine Mile Bayou to the Lake of the Mound is confirmed by the report of the cruise of the "Fish Hawk" which states as to all these interior waters: "The depth of water is generally from 3 to 6 feet, although in some of the bays, particularly those to the eastward, there are channels through which a considerably greater depth can be carried." With its judicial knowledge of the geography of the entire coast, even of the position of the islands near to it (*State* v. *Wager*, 61 Me., 178), supplemented by the uncontested parol proof as to the navigable character of the water, the Court should, with the aid of the maps, find no difficulty whatever in adjudicating that the red line marked on map No. 59 herewith submitted is the eastern shore line of Louisiana in the region where it is important to define it.

The Coast Survey expert, W. C. Hodgkins, upon whose skill Complainant so confidently relies, has traced the mainland coast line of Louisiana at this point in substantial accordance with the red line on map No. 59. In Record, p. 481, he says: "As requested by counsel for the State of Mississippi I have indicated on a copy of map No. 7, by a red line from the point marked *B* on the shore of Lake Borgne to the point marked *C* northwest of Point Chico, what appears to be the physical coast line on this portion." There is no conflicting testimony on that point.

All of which is respectfully submitted.

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